

# **Submission to the Sentencing Council – Department of Justice**

## **New South Wales**

### **Review of sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods for murder**

The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

**Following from my original submission to the Sentencing Council dated January 2018 (PMU08).**

**I have now considered the Consultation Paper contents (October 2019) and items listed - 1 to 6 and addressed a number of questions, which are listed at the end of this original submission, commencing on page 12 of this document.**

By way of introduction and background, I was an employee with Corrective Services New South Wales (CSNSW) for 30 years, commencing as a Probationary Prison Officer in 1984 and completed my career at the rank of Superintendent in 2014. I appeared on numerous occasions as a subject expert witness at Judicial hearings (District & Supreme Courts), Administrative Appeals Tribunal & Coronial Inquests for CSNSW, in relation to the classification and protective custody of inmates and removal of hanging points within prison and court cells. Received a Commissioner's Commendation for significant work and dedication given to CSNSW. Received a Deputy Commissioner's Commendation for loyal and dedicated service and outstanding contribution to Offender Management & Operations Branch – CSNSW.

I have trained hundreds of both custodial and non custodial staff in the specialised area of inmate classification and placement of inmates throughout NSW. I was responsible for the classification of thousands of inmates throughout the NSW Correctional system during my career, also being an active member of the Serious Offenders Review Council and its sub-committees and delegate of the Deputy Commissioner on the Board of Management – Death in Custody Committee and other numerous high level steering committees.

I provided numerous information sessions to both internal groups and external agencies (both law enforcement agencies and NGO's), as well as overseas correctional law enforcement delegations about the inmate classification system, protective custody and policies & procedures within CSNSW.

**The standard non-parole periods for murder and whether they should be increased:**

During part of my professional career within CSNSW, both as a Deputy Superintendent of Inmate Classification and Assistant Director of Inmate Placement & Classification, I was responsible for the classification of numerous inmates that had been convicted of murder and manslaughter. This involved assigning the inmate an initial classification rating when first sentenced and during the course of the inmates incarceration as a member of the Serious Offenders Review Council (SORC) and reviewing and recommending the regression and progression of a convicted murderers within the correctional system.

From a perspective of initially when an offender is convicted of murder and commences his/her custodial sentence within the correctional system, the inmate requires a detailed case management plan to be developed in order to manage this offender that is

incarcerated for the next 15, 20, 30 or 40 years of their life or even for the rest of their natural life if sentenced to a term of Life imprisonment.

As a rule, it was extremely important to have access to the 'Judges Sentencing Remarks' (JSR) when assigning a classification rating and developing a case plan for the offender. The SORC have set guidelines when an offender who is classed as a Serious Offender and is convicted of murder, is able to progress through the NSW correctional classification system in line with detailed policy and procedures that are under pinned by legislation.

However, a number of concerns arise and disputes take place when a Serious Offender that is convicted of murder can be considered for release back into the community under parole supervision and invariably raises media attention, political interest and concerns by the victims family and community in general.

On too many instances, the sentence imposed for murder does not reflect community expectation and allows advocates to demand for longer sentences to be imposed by the courts for the offence of murder.

I have classified offenders that have been convicted of multiple murders and those convicted of one murder. Individual circumstances are taken into consideration by the sentencing Judge as to the relevant facts involved in the case, re: plea of guilty, has the body been found, medical and psychiatric reports, showing remorse, etc.

When dealing with offenders that have been convicted and sentenced for the offence of murder, requires detailed information to be recorded within the JSR, that ultimately assists corrections staff and the parole authority to ensure that every risk factor has been taken into consideration before allowing the offender to progress to a minimum security classification and engage in external leave programs and to eventually be considered for release on parole supervision with specific conditions to comply with.

I was responsible for contributing to the progression of serious offenders during my role within the Inmate Classification Branch, by providing a submission that would allow serious offenders to be staged and progress to various security & classification levels at different time frames of their non-parole period.

This staged progression allowed the careful and structured management of the offender in custody and also provided a clear pathway for the inmate to follow and be able to achieve during their custodial sentence.

On to many occasions, the release of a murderer from custody upon serving their non-parole period and/or when into their additional term, has created significant heartache for the victims family and public outrage, along with a media frenzy. Recent events such as the future release of triple murderer 'Berwyn Rees' (27 Years NPP) or child murderer 'Michael Guider' (12 years NPP), highlights these very concerns and can never be

understood and accepted by the community and that of the victims families.

### **Consideration:**

Should there be categories established for the offence of murder that allow for specific non-parole periods, subject to individual circumstances of the offender and factors involving the offence. Currently there are specific guidelines contained within Section 18(1)a *Crimes Act 1900* (NSW) that provide established non parole periods for the offence of murder.

Rather than having specific non-parole periods, there should be in legislation the ability to scale a non-parole period from 20 to 50 years, with the option to impose a Life parole period and further options of imposing a sliding 10 to 20 year parole period.

The JSR should clearly indicate by the Sentencing Judge at the time, the prospects, if any, of rehabilitation and release and reintegration back into the community. The old term of **'recommended never to be released'** which currently still applies to a number of offenders that are in custody in New South Wales and were incorporated within a JSR /Judges Comments and recorded on the warrant of commitment, should be replaced in the future with **'subject to compliance of correctional and parole authorities'**.

To sentence an offender for the offence of Murder and remove that offender from society for a significant period of time, sometimes involving 15, 20 or 30 years and then expect that the offender can return back to society fully rehabilitated, places a significant amount of responsibility and expectation on CSNSW. CSNSW is often criticised for the management of long term serious offenders and are presented with obstacles when attempting to progress these types of offenders into pre-external leave programs, prior to release from custody.

Yet, when the offender has engaged in specific aspects of their case management plan, addressed their offending behaviour via targeted therapeutic programs and achieved participation in the pre-external leave programs, they are still challenged by the legal process and associated external pressures outside of the correctional system.

I fully support that an offender who is convicted of murder, should be very closely monitored whilst in custody to ensure that they are complying with detailed requirements involving employment, engage in targeted offending programs and to be of good behaviour and conduct, during their incarceration. There should be zero-tolerance in any adverse or negative behaviour displayed by the offender whilst in custody. At the same time, if the offender has fulfilled all of his/her obligations as set down by the Courts and Corrective Services, then support should be given to allow reintegration back into the community.

***“Ultimately, it is the sentencing Judge that determines what the non-parole period of offender convicted of murder is and any backlash as to why is the offender now being released back into the community, should be really redirected to the original sentencing judge and comments recorded within their judgement”***

## **Two Tier Sentencing Structure for Murder:**

Establishing of Categories of Murder and a two tier sentencing structure, such as;

Categories and scale of seriousness:

**Murder Category One** - **Life Sentence (with no possibility of release, term of whole natural life)**

Aggravating circumstances that would apply to this category (examples only);

- The murder occurred whilst the commissioning of a number of violent crimes, such as, sexual assault, robbery, arson, assassination, kidnapping;
- The murder involved torture, cruelty or was particularly violent;
- The murder involved terrorist acts and the use of bombs, vehicles, weapons of destruction;
- The murder involved criminal gangs, multiple victims;
- The murder victim was a **law enforcement officer** performing his/her duties;
- The victim was a Judge/Prosecutor/Judicial Officer, Witness or Juror that was murdered to prevent the performance of their duties, and;
- The offender had a previous conviction for murder or a serious violent offence.

**Murder Category Two** - **20 to 50 year non-parole period with a Life sentence parole period or a sliding 10 to 20 year parole period.**

- An offence of murder that does not fall within Murder Category One.

### **Examples:**

1. The situation of a first time young adult offender between the ages of 18 to 25 that is convicted of a murder as opposed to an offender who is over the age of 60 with the same category offence.

Factors such as likelihood of the offender being released to the community after serving 20 to 50 year non-parole period and will be in the age bracket of 45 to 50.

2. The offender who is 60 years of age and over and has served 20 to 50 year non-parole period and being released to the community in the age bracket of 80 and over.

These two examples can vary significantly and one can take on the view that when a young adult offender serves a significant period in custody for murder and is still able to be released back into the community at a reasonable adult age, may successfully be able to return as a law abiding citizen and hopefully never re-offend and return to custody.

As opposed to an elderly offender who may well be in his late 60's, 70's or 80's and has already served a significant period in custody, what risk would this offender now pose to the community in this age bracket ?

Reference is made to an article featured in the *Sunday times Website* – *'How jail time is determined in South Africa'* – dated 6 June 2018 by Law for All;

*"While it isn't an easy task to determine the appropriate punishment, there are three principles that the courts use to guide them in determining the correct sentence" says Nagtegaal. These principles are collectively known as the "Triad of Zinn": the gravity of the offence, the circumstances of the offender, and public interest.*

Reference is made to a publication by NSW Bureau of Crime Statistics and Research – Sentencing snapshot: Homicide and related offences – issue paper no.76 February 2012;

*The average age of an adult offender convicted of homicide in NSW during the years 2009 to 2010 was 35 years. Of these, 84.1 per cent were male, and 59.5 per cent had no prior convictions in the previous five years. The most common penalty imposed on homicide offenders was a full-time prison sentence. Among those that received prison sentences, the average minimum term was just over 8.5 years and the average aggregate sentence was 11.8 years. Of those who committed a murder, 100 percent received a prison sentence, with an average minimum term of 20 years and an average aggregate sentence of 25 years.*

When an offender is sentenced to a term of imprisonment for murder, Corrective Services NSW is responsible for the housing, management, care and rehabilitation of that offender for a significant set period of time as determined by the courts. In conjunction with the State Parole authority, these two state sanctioned authorities have a significant responsibility and role to play, in order to ensure that the offender is not only detained in a safe and humane manner and environment, not posing a risk to other inmates, not posing a risk to correctional staff, not posing a risk to the correctional centre and not posing a risk to the community, but must also ensure that the offender is suitable to be released back into the community under some type of supervision for a determined period as set down by the sentencing Judge.

So to just expect that a Judge sentences an offender to a 25 year non-parole period for the offence of murder and then expectations that the offender will return to society rehabilitated and as law abiding citizen, does not always eventuate as intended.

A convicted murderer in custody does not necessarily have to engage in a violent offender program if the victim was a spouse.

A convicted murderer will need to engage in a specific violent offender therapeutic program, where the offence involved significant violence, such as (robbery with a weapon, or physical violence by the offender), such as in the case of an armed robbery or robbery of a person/s, business or organisation, etc.

*Section 61 Crimes (Sentencing Procedure) Act 1999 creates mandatory life sentences for certain offences if the prosecution can establish certain requirements.*

*This means, the court is required to give a life sentence if an offender commits murder or a serious heroin or cocaine trafficking offence in NSW, only if the prosecution can prove beyond reasonable doubt as to each of the following requirements:*

*In the case of murder:*

- *There was an extreme level of culpability (criminality by the offender), and*
- *The community interest in retribution, punishment, community protection and deterrence can only be met through imposing a life sentence.*

*Life imprisonment was introduced in NSW in 1990. Since then, 16 people in NSW have received life sentences, out of which, 3 have died in custody. These figures are much higher than in any other state in Australia.*

*Generally, a two-step process is involved when considering the necessity for a term of life imprisonment.*

*First, the court must find that the facts of the case and the offender's actions were so severe that a life sentence ought to be considered.*

*If the crime attracts such a consideration, the court must then decide whether there were any circumstances, personal or other, that may deter the court away from such a heavy penalty (of life).*

*For example, where the court does not believe that there is a need to protect the community from this individual, and where there is another more appropriate type of punishment available.*

*In other cases, the individual facts of the crime may be so appalling that the need to sentence a person to prison for the remainder of his/her life overcomes any possible prospects of rehabilitation that person had. (Reference Source: The Law on Mandatory Life Sentences in NSW – By Criminal Defence Lawyers Australia – 6/5/2018)*

Reference is made to: Judicial Commission of NSW – Sentenced Homicides in NSW 1994-2001;

*Regardless of what changes do occur to sentencing levels, the sentencing task and the*

*accompanying reasons for sentence will have to be approached with particular care and diligence, so as to address all mitigating and aggravating features as defined by the new Act 428 in justification of the sentence.*

*Whether the new legislation does create a major change in murder sentencing patterns remains to be seen, and the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 calls for the creation of a Sentencing Council to monitor and report on sentencing trends and practices under the new legislation. Homicide sentencing will no doubt attract the attention of this body and other independent researchers in the years ahead.*

### **Victims Impact and importance on the sentence length imposed for murder:**

If considering an increase in the standard non-parole period of murder, I provide the following example of an actual case involving an offender committing separate murders and serving two separate sentences. Not identifying the offender by name, Offender X had been convicted of a murder and served a relatively short non-parole period and then being released on parole.

Then the unimaginable occurred again, Offender X whilst now living in the community, attempting an armed robbery at a service station, murders an overseas student, that was working part time at the service station. Offender X receives a non-parole period again for the conviction of murder, this is now his second murder conviction.

With no family in Sydney (NSW) to speak and raise their anguish and heartache on the victims behalf, no media to detail and report Offender X's shocking criminal history and now being convicted for a second time for the offence of murder and again only given a specific non-parole period.

The victims family in this case does not have any bearing and unfortunately the courts have allowed the opportunity for Offender X to be released again into the community at some point, after committing two separate murders of innocent people.

This is totally unacceptable and there needs to be some form of accountability and mechanism that will not allow this scenario to occur ever again. The victims family, regardless if they voice their concerns or not and regardless if they reside in NSW, Interstate or Overseas, need to be represented in a more robust and responsible format by the Judiciary (Prosecution and Judge).



## **Summary:**

As I have outlined within this submission, I would strongly support that the standard non-parole period for murder be increased. However, there needs to be a greater emphasis on the structure of the sentence being imposed for the offence of murder. As we are fully aware, years pass and at some stage the offender that has served 12, 15, 20 or 30 years becomes eligible for release on parole.

By introducing a sliding scale for the 'Category Two Murder' offence, this will enable the Sentencing Judge and Judicial system the opportunity to establish a sentence that clearly reflects the seriousness of the offence and the impact that it has had on the victims family and the community.

However, just as it is important to reflect on the impact of the victims family and the concerns of the community when this offence has occurred, it is also important to consider that the offender at some stage will be released from custody, due to the sentence imposed by the Judge.

It is crucial that both the keeper of the offender (CSNSW) and the SPA are actively engaging in a pro-active and on-going management plan for the whole of sentence of the offender.

By increasing the non-parole period for the offence of murder, does in fact require a more whole of sentence approach and planning. We tend to lose site of the purpose and intention of *Section 3A (d) Crimes (Sentencing Procedure) Act 1999, which is;*

### ***(d) To promote the rehabilitation of the offender***

It would be of immense benefit to the authorities (CSNSW and SPA) that are managing the offender for a significant period of both incarceration and community supervision, that the Sentencing Judge specifies set milestone dates that the offender must have achieved and complied with, this will ensure that the rehabilitation aspects are achieved. This will require a collaborative approach involving the Judiciary, CSNSW and SPA.

If there is to be a greater emphasis to ensure that an offender serving a sentence for murder is being held accountable for their actions, recognising the harm done to the victims of the crime and the community and deterring others from committing the same offence, then collectively there needs to be a number of changes beginning with the sentencing structure and requirements.

## **Recommendations:**

- 1. That consideration be given in establishing a two tier structure of sentencing for the conviction of Murder as described and outlined within this submission. A review by the Sentencing Council and Judiciary should be undertaken to explore the introduction of a sliding sentence for the Category Two Murder conviction (20 year minimum – 50 year maximum) and expanding the context of imposing a Life Sentence as described in Category One Murder conviction.**
- 2. That a significant amount of consideration should be made at the sentencing of an offender and included in the 'Judges Sentencing Remarks' to ensure that it is very clear, concise and documented by the sentencing Judge at the time, that there is an expectation that the offender will be released from custody under some form of parole supervision if not sentenced to a Life Sentence. That the term '*subject to compliance of correctional and parole authorities*', be incorporated within the 'Judges Sentencing Remarks' and endorsed on the warrant of commitment under 'special comments'.**
- 3. That both Corrective Services NSW and State Parole Authority will in the first initial three (3) month period of the offenders custodial sentence, develop a sentence pathway and case management plan for the offender that will take into consideration the Sentencing Judges comments and ensure that victims and community expectations have been taken into consideration when considering the progression of the offender within the prison classification system and eventual release of the offender under parole consideration.**
- 4. That the State Parole Authority have an active and continuous role, involvement and responsibility in the sentencing pathway and case management plan of an offender convicted for murder in the beginning of the offenders custodial sentence and not only when the offender is nearing his/ her non-parole period and seeking parole consideration. This early involvement will ensure that consistency is in place and that there is an on-going contribution and holistic approach of the offenders custodial sentence from beginning, during and completion of the non-parole period.**
- 5. That when the sentence of an offender for murder is delivered by the Sentencing Judge, it should be clearly identified that if the offender has complied with all the requirements of the sentencing pathway and case management plan developed by Corrective Services and the State Parole Authority, that the granting of parole will be given all consideration, and any concerns expressed and raised by the victims family and community concerns will be a major contributing factor when considering release or refusal of parole.**
- 6. That the Sentencing Council should ensure that there are very specific comments and details within the Judges Sentencing Remarks at the time of sentencing of an offender for murder. This will contribute immensely in the long term when the offender is nearing the completion of their non-parole**

**period and is seeking release on parole. The victims family and the community are to be better informed of the procedure and process of when considering parole and although may not accept or express concerns that the offender should be released at that specific point, will allow them to be better informed and aware that the offender has had to comply with requirements of the sentencing pathway and case management plan that was set in place through-out the offenders custodial sentence.**

- 7. That when a victims family is located outside of NSW, in another State or Territory of Australia or Overseas, there needs to be some form of accountability and mechanism that will direct the Sentencing Judge to consider the impact of the victims family, although not made available due to circumstances that are unavoidable. The victims family, regardless if they voice their concerns or not and regardless if they reside in NSW, Interstate or Overseas, need to be represented in a more robust, responsible and documented format at the time of sentencing of an offender for murder.**

Should the Sentencing Council require additional information, wish to have a more formal discussion or to provide further comment in relation to this submission, please do not hesitate to contact me.

Forwarded for your consideration,

Domenic Pezzano JP

**ADDITIONAL INFORMATION FOLLOWING NOTICE OF CONSULTATION PAPER  
ISSUED ON OCTOBER 2019**

- **Views and comments on Consultation Paper – Homicide NSW Sentencing Council – October 2019.**
  
- **Victims Impact Statements:**

**Points 3.45 to 3.49.**

Within my previous submission, I provided an example of issues relating to ‘Victims Impact Statement’ and there was no reference within the Consultation Paper about this information.

I reiterate the following information provided in my previous submission;

***Victims Impact and importance on the sentence length imposed for murder:***

*If considering an increase in the standard non-parole period of murder, I provide the following example of an actual case involving an offender committing separate murders and serving two separate sentences. Not identifying the offender by name, Offender X had been convicted of a murder and served a relatively short non-parole period and then being released on parole.*

*Then the unimaginable occurred again, Offender X whilst now living in the community, attempting an armed robbery at a service station, murders an overseas student, that was working part time at the service station. Offender X receives a non-parole period again for the conviction of murder, this is now his second murder conviction.*

*With no family in Sydney (NSW) to speak and raise their anguish and heartache on the victims behalf, no media to detail and report Offender X's shocking criminal history and now being convicted for a second time for the offence of murder and again only given a specific non-parole period.*

*The victims family in this case does not have any bearing and unfortunately the courts have allowed the opportunity for Offender X to be released again into the community at some point, after committing two separate murders of innocent people.*

*This is totally unacceptable and there needs to be some form of accountability and mechanism that will not allow this scenario to occur ever again. The victims family, regardless if they voice their concerns or not and regardless if they reside in NSW, Interstate or Overseas, need to be represented in a more robust and responsible format by the Judiciary (Prosecution and Judge).*

### **Question 6.1: Maximum penalty for Manslaughter**

I do not support a mandatory minimum penalty for this offence. Rationale for this view is;

This option would be left open to criticism by the public, community groups and political representatives. As it would be a preferred option for a Judge to impose in these circumstance, thus removing the onus of responsibility to take into account the gravity of the offence, such as a manslaughter that occurred as a result of an aggravated home burglary, invasion or robbery, where there was a loss of life.

There have been a number of instances whereby the victim has later died following the attack, sometimes weeks or months later in hospital from injuries sustained during the assault / attack. This should not remove the seriousness of what had originally occurred during the commissioning of the crime.

It would be an easy option to take, without considering the gravity of the crime and the devastation that it has had on the victims families and the community in general.

I would support an increase of the maximum penalty of manslaughter to 30 years.

### **Question 6.3: Mandatory life imprisonment**

**(1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?**

**(2) What changes, if any, should be made to the existing provisions relating to mandatory life imprisonment for the murder of a police officer?**

It is my recommendation that there should be amendments to the imposing of a Life Sentence for murder as I outlined within my previous submission, they are;

- *The murder occurred whilst the commissioning of a number of violent crimes, such as, sexual assault, robbery, arson, assassination, kidnapping;*

- *The murder involved torture, cruelty or was particularly violent;*
- *The murder involved terrorist acts and the use of bombs, vehicles, weapons of destruction;*
- *The murder involved criminal gangs, multiple victims;*
- *The murder victim was a **law enforcement officer** performing his/her duties;*
- *The victim was a Judge/Prosecutor/Judicial Officer, Witness or Juror that was murdered to prevent the performance of their duties, and;*
- *The offender had a previous conviction for murder or a serious violent offence.*

Their should be changes to encompass a Life Term for a 'law enforcement officer' and not only a 'Police Officer'.

Specifically a 'Correctional Officer' would fall within this category.

In NSW we have had a number of Correctional Officers who have been killed whilst performing their duties. They are a sworn officer of the crown and on a daily basis have to deal with very dangerous and volatile situations within the prison system.

Unlike Police Officers and Fire & Rescue Officers which receive a lot of public accolades, praise and their actions are readily seen by members of the public. Correctional Officer duties are very broad, either working within the confined walls/fences of a prison, escorting inmates outside the walls of the prisons and perform these duties with limited resources and under extremely dangerous conditions. And as a result of the volatile environment that they work within, are victims to fatal assaults and violent acts.

There has been 12 recorded deaths of correctional officers in NSW. The most recent was in 2007 when a senior correctional officer was violently attacked by an inmate in December 2006, however died later in hospital in January 2007.

Reference is made to comments by 'Judge Roy Ellis at the time of sentencing Carl Edward Little – 6 August 2009 for the vicious attack on the Officer';

*During sentencing at Parramatta District Court, the Judge, Roy Ellis, said the crime was "inexplicable".*

*"It's hard to imagine a worse example of a determined effort to kill a man for no real reason," he said. "Mr Little kicked him and continued to kick him even when he was being dragged away by numerous correctional officers."*

*Little will serve a maximum sentence of 20 years and six months and will be eligible for parole in 2023.*

Given the risk that front line correctional officers face in their employment, dealing with very violent and dangerous inmates within the prison and whilst escorting inmates external to the prison walls, their needs to be some form of deterrent which ensures that inmates will not attack/ambush a correctional officer.

Reference is made to '*The Crimes Amendment (Murder of Police Officers) Act 2011 amended the Crimes Act 1900 by inserting s 19B*';

#### *Murder of police officers*

*The Crimes Amendment (Murder of Police Officers) Act 2011 amended the Crimes Act 1900 by inserting s19B. Section 19B requires a court to impose a sentence of life imprisonment where a police officer is murdered in the course of executing his or her duty; or as a consequence of, or in retaliation for, actions undertaken by any police officer in the execution of their duty where the person knew or ought to have known that the person killed was a police officer. The person must have intended to kill the police officer, or have been involved in criminal activity that risked serious harm to police officers. Section 19B applies to offences committed after 23 June 2011: s 19B(7).*

It is my opinion that there is minimal difference in the responsibilities and risk that correctional officers have, as compared to that of police officers when dealing with dangerous and violent offenders;

Changes to Legislation would be as follows;

*Mandatory life sentence if murder was committed: (a) while the correctional officer was executing his or her duty, or (b) as a consequence of, or in retaliation for, actions undertaken by that or any other correctional officer in the execution of his or her duty, and if person: (c) knows that the person killed was a correctional officer, and (d) intended to kill the correctional officer or was engaged in criminal activity that risked serious harm to correctional officers.*

NSW Correctional Officers killed in the line of duty:

2007: Wayne Smith, Silverwater. Attacked and bashed by Carl Edward Little while escorting him to a new cell. Succumbed to his injuries six weeks later.

1997: Geoffrey Pearce, Long Bay. Stabbed with a HIV-positive needle by Graham Farlow in 1990 and died from AIDS eight years later.

1979: John Mewburn, Long Bay. Bashed to death by convicted murderer Peter Schneidas.

1974: Carl Faber, Parramatta. Bashed to death by a group of prisoners during an unsuccessful escape bid. Died from his injuries four years later.

1959: Cecil Mills, Emu Plains. Bashed to death by prisoners during an attempted escape.

1959: Albert Hedges, Berrima. Bashed and locked in a shed during an escape attempt. He survived and after rehabilitation returned to work. However his injuries were so severe he was medically retired and passed away several years later.

1958: Alan Cooper, Bathurst. Bashed to death by two prisoners at the front gate of the jail during a failed escape.

### **Question 6.5: Mandatory Life imprisonment with a non-parole period.**

I have detailed in my earlier submission the changes to imposing a 'Life Sentence' and the category of offences that would attract an automatic Life Sentence.

Category 1 – Life Sentence, should remain as a natural Life Sentence, with no non-parole period (**Refer to page 5 previous submission - Two Tier Sentencing Structure for Murder**)

Reference is made to points 6.21 and 6.22 of the Consultation Paper;

*6.21 Some of the criticisms of the current natural life provisions in NSW centre around concerns that offenders who are sentenced to life imprisonment are denied the opportunity of release on parole. One submission to this review questions the appropriateness of natural life sentences that disregard the possibility of future rehabilitation.*

*6.22 The courts have noted the harsh nature of natural life sentences, including the difficulty in predicting the impact of incarceration, and of any rehabilitation programs available in custody, on an offender's future dangerousness. The experience of the courts in redetermining sentences after the 1989 reforms illustrates the unpredictability of rehabilitative outcomes.*

I do not support these comments. The reasons that an offender was sentenced to a 'Life Term' of imprisonment, is due to the seriousness of the murder/s that have been committed and circumstances of the crime that occurred.



For any consideration that a convicted offender such as '*Sef Gonzales, Alan O'Connor, Roger Dean, Andrew Garforth, Malcom Baker and Robert Xie*', be given a non-parole period in order to be provide them with an opportunity to return to the community as a law abiding citizen after being rehabilitated in custody is unacceptable.

We would be presented with the same situation and scenario as a 'Berwyn Rees', that was paroled after murdering three people, this is totally unacceptable to the community and a grave injustice to the victims and their families.

Reference is made to comments by Judge Hulme in the sentencing of Alan O'Connor – Dubbo Supreme Court for a triple murder;

***'Justice Robert Hulme said the sentence needed to be strong to deter domestic violence crimes.***

***He said anyone who could kill their partner over an interest in another person was the "antithesis of what a mature, humane and law-abiding society will tolerate".***

***'There is nothing that mitigates the objective gravity of these most heinous crimes'.***

I have previously in my submission referred to the cases of triple murderer 'Berwyn Rees' (27 Years non-parole period) and child murderer 'Michael Guider' (12 years non-parole period) and the concerns from the victims families, general public, community groups and politicians that were raised at the time, when these two offenders were being considered for release back into the community.

I reiterate, that if a 'Life Sentence' was imposed for an offender by the courts, their should be no option available to introduce a non-parole period with that sentence. An offender that has been convicted of a horrendous crime involving murder/s in the following categories, should never be released back into the community;

- *The murder occurred whilst the commissioning of a number of violent crimes, such as, sexual assault, robbery, arson, assassination, kidnapping;*
- *The murder involved torture, cruelty or was particularly violent;*
- *The murder involved terrorist acts and the use of bombs, vehicles, weapons of destruction;*

- *The murder involved criminal gangs, multiple victims;*
- *The murder victim was a **law enforcement officer** performing his/her duties;*
- *The victim was a Judge/Prosecutor/Judicial Officer, Witness or Juror that was murdered to prevent the performance of their duties, and;*
- *The offender had a previous conviction for murder or a serious violent offence.*

To suggest otherwise, is not considering the information that the Consultation Paper has stated in point: 1.2;

***Homicide and personal violence have devastating consequences for all parts of society, including the victims themselves, their children, other family members, friends, colleagues and the community. Estimations of the economic impact of homicide are often made, but the emotional and personal costs of such offending are too great to be measured.***

If a non-parole period is to be considered for an offence of Murder, then it should fall into the 'Category 2 Sentencing Structure', that I have identified within my earlier submission.

During my professional career when dealing with offenders that were sentenced to a term of 'Life' prior to changes in legislation and truth in sentencing laws in 1999, I can refer to two particular offenders that had been convicted of murder (a partner in one case and a spouse in another case) and were sentenced to 'Life' under the previous legislation. They subsequently had their 'Life' sentence re-determined and served a specified non-parole period and successfully were released back to the community under a parole supervision for a set period. These 'Lifers' had achieved a minimum security rating within the correctional system and had engaged in appropriate rehabilitative programs in custody, prior to release back into the community under parole supervision.

However, these individual cases did not fall within the 'Category 1 Sentencing Structure' that I have identified within this submission. There is no doubt that the imposing of a Life Sentence is an extreme measure and should only be adopted in the most heinous cases, as I have identified.

The rationale that was used within point 6.31 of the Consultation Paper is incorrect in my opinion, it states;

*One submission to this review considers that introducing mandatory life sentences for murder with parole available after a mandatory minimum non-parole period is*

*the preferable model. This is because “it allows a full assessment of the perpetrator to ensure that they are fit and able to return to the community, and have undergone an appropriate level of rehabilitation”. The current system means that, where the court imposes a determinate term, an offender may be released at the end of the term, without even attempting rehabilitation.*

I have identified in detail within my earlier submission of the need to incorporate a holistic approach of the case management of a serious offender in custody that has been convicted of Murder / Manslaughter in order to ensure that they are suitable to be considered for release back into the community under strict parole conditions after completing the necessary components of their case management plan and addressing their offending behaviour.

When an offender has not complied with their set case plan and not having addressed their offending behaviour in custody, will as a natural procedure and safeguard not be considered for release on parole by the Serious Offenders Review Council and will not be granted parole by the State Parole Authority

To suggest that by imposing a non-parole period to a offender with a Life Sentence is going to ensure that they are provided an opportunity to be rehabilitated and are deemed suitable to return back to society, is in contradiction with an offender being originally given a determined non-parole period. They are two totally different sentences, that should be kept separate for obvious reasons and as outlined within this submission.

In conclusion, if the offender has a ‘Life Sentence’ imposed, he/she is not eligible for release back to the community, as they have have engaged in the most horrendous crime against another human/s and this would be reflected in the Judges Sentencing Remarks.

Why, as an educated and civilised society would we consider allowing a non-parole period for an offender given a natural ‘Life Sentence’ to be set. This procedure would not be taking into account the concerns of the victims families, public and general community groups. The protection and safety of the public should be the first priority and not the rehabilitation opportunities of the offender in the cases that fall within the ‘Category 1 Sentencing’ for Murder.

Reference is made to a report titled: ‘*Standing Committee on Law and Justice – Security Classification and management of inmates sentenced to life imprisonment dated - 4 April 2016 Report 58*’, it states the following;

***Community expectations:***

*3.28 Community expectations constitute an important aspect of the reclassification process. When reclassifying serious offenders, the Serious Offenders Review Council*

*must consider the public interest, the protection of the public, the need to maintain public confidence in the administration of criminal justice and the need to reassure the community that serious offenders are in secure custody. The full list of matters the Review Council must consider is set out in the Crimes (Administration of Sentences) Act 1999130 and is reproduced in chapter 2.*

*3.29 The community outrage in July 2015 that was sparked by the reclassification of Andrew Garforth from A2 to B illustrates that many people in the community expect lifers to remain in maximum security facilities for the rest of their life.*

*3.30 There was genuine concern expressed by parts of the community following the reporting of the reclassification of Andrew Garforth. However as noted earlier, much – but by no means all – of this concern arose from the lack of clear information the public had as to the impact of this reclassification. Some of this lack of accurate information meant that there was real confusion as to whether or not reclassification had a direct relationship with increased privileges. As is noted in chapter 2, this is not the case.*

*3.31 The issue of how lifers are treated in custody clearly produces strong views among members of the public. For example, one inquiry participant declared ‘prison is not supposed to be a resort is it?’, and argued that lifers should suffer while in prison and not have a moment of comfort:*

*We, the public will fight any changes in reform to allow these animals one minute of peace, comfort or luxury... even near death. I don't care if they are not a threat to the victims' families or to society because they are now somehow incapacitated or depressed. I want them to suffer, I want them to be miserable, bored, lonely, cold, hungry, hated and forgotten. They deserve nothing less. If you allow any changes in the way they are treated for the better, you are being disrespectful to the victim, her family and to us who trust in you to do what's just. Justice is not for the murderers, it's for [the victims]. Do what's right by them. Leave these whiners to suffer, to think about the choices they made to choose this life for themselves. Who cares how much they whinge, they do not deserve the time to even discuss their woes. They didn't care about the suffering they inflicted on the victims and we do not care what they think is fair or unfair.*

### **Issues with taking community expectations into account**

*3.32 Although it is important to consider community expectations, many inquiry participants discussed the difficulty of taking the public interest into account, as there is a significant lack of education and understanding in the community regarding the criminal justice and correctional systems (this issue was touched upon in chapter 2 at 2.59-2.65 in regard to lack of communication with victims).*

I have detailed within this submission the two main differences in considering a sentence length for the offence of murder.

It should not be the responsibility of the victims families, public, community groups and political parties to ensure that the correct sentence is imposed for an offender that has committed an offence of murder or manslaughter. But rather the judicial system, should be responsible that it has taken into account the devastating impact that these types of offences have on the victims families and the community, together with applying the laws of the State. To suggest that community/public expectation is to emotional and is ill informed, is not educated, have poor knowledge or unaware of trends in crime or inmate management is an insult to each individual member of the public.

Reference is made to a study issued by *'Kate Warner, Julia Davis and Helen Cockburn – tilted: The purpose of Punishment: How do Judges apply a legislative statement of sentencing purposes ?'*

*General deterrence was the most often mentioned purpose and it was also given the most weight – it was most often the predominant purpose, the very important purpose and an important purpose. Protection of the community from the offender (incapacitation) was the second most common predominant purpose, which was not surprising given the statutory requirement for this to be the principal purpose in cases where the serious offender regime applied. In fact, all cases where protection of the community was the predominant purpose were cases where the serious offender regime required it to be the principal purpose of the sentence. However, protection of the community was second only to rehabilitation as the least mentioned purpose.*

*After general deterrence, denunciation was the purpose given the most weight, followed by just punishment. Rehabilitation was given the least weight and the offender's prospects of rehabilitation tended to be dealt with separately from other purposes and was mentioned more often as a mitigating circumstance rather than as a purpose of sentence in its own right.*

**Point 6.74: Availability of alternatives to imprisonment for manslaughter**

Reference is made to *'CRIMES ACT 1900 - SECT 18 - Murder and Manslaughter defined'*, it states the following;

## **18 Murder and manslaughter defined**

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

The consultation paper provides the following information within point 6.75: *'In the past 5 years, there have been 2 manslaughter cases where courts have imposed a bond with supervision and 2 cases where courts have imposed suspended sentences'*.

Point 6.76 states: *'This raises the question of whether intensive correction orders should be available for less serious cases of manslaughter'*.

It would be most useful and important to know if there was any appeal against the inadequacy of the sentence imposed (bond with supervision / suspended sentences) that was lodged against these specific manslaughter cases and what was the result of the appeals ?

I would strongly support that alternatives to imprisonment should be available for manslaughter offenders. The offence of manslaughter can be as a result of many situations and circumstances involving the crime. The fact that the courts have found it suitable to impose a bond with supervision and a suspended sentence, clearly indicates that some form of sentence was required to be issued to the offender, whilst at the same time taking into account the unique circumstances of the actual crime.

The fact that we now have within NSW as a sentencing option of 'Intensive Corrections Order' (ICO), should in my professional opinion be strongly considered as a sentencing option for manslaughter, where it has been found and established that there was 'provocation, self defence'.

At present an ICO **can not** be imposed for the offence of 'Murder, Manslaughter or Sexual Assault'.

*An ICO is a custodial sentence of up to two years that the court decides can be served in the community. Community safety is the court's paramount consideration when making this decision.*

*The old ICO has been overhauled. Unlike suspended sentences, supervision is mandatory. Courts can add conditions to an ICO such as home detention, electronic monitoring, curfews, community service work (up to 750 hours), alcohol/drug bans, place restrictions, or non-association requirements. Offenders may also be required to participate in programs that target the causes of their behaviour.*

*Community Corrections Officers have clearer authority to deal with breaches of conditions in real time. For more serious breaches, offenders will continue to be referred to the State Parole Authority (SPA) and may be required to serve the remainder of their sentence in custody.*

*The ICO is the most serious sentence that an offender can serve in the community. ICOs are not available for offenders who have been convicted of murder, manslaughter, sexual assault, any sexual offence against a child, offences involving discharge of a firearm, terrorism offences, breaches of serious crime prevention orders, or breaches of public safety orders. (source of information: CSNSW Website – NSW Justice – ICO)*

I would strongly support that the Sentencing Council of NSW consider an 'Intensive Corrections Order' be legislated in order that the offence of Manslaughter can be considered as a sentencing option, only in the extreme cases where the courts were considering an alternative to full time imprisonment by way of a bond with supervision, community based order or a suspended sentence. The only concerns at present with imposing an ICO, is that the order is limited to a maximum of a two year period under current legislation.

This option would at least provide some form of conditions being imposed on the offender in order to take into consideration any community concerns and also maintaining public confidence in the judicial process. The ICO would be imposed with a view that the offender has some form of electronic monitoring and curfew being imposed, if a risk assessment deems it appropriate and necessary. In the event of a breach occurring whilst on an ICO, the offender can have the ICO revoked and serve the balance as a full time custodial sentence. This sentencing option should only be utilised in extreme cases as determined

by the evidence and circumstances of the specific offence and matter before the court.

- **Redetermining natural life sentences**

**Question 6.9:**

***Redetermining natural life sentences In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder?***

I have detailed within my submission and additional information in relation to the Consultation Paper, my rationale and objections to imposing a non-parole period to a Life term Sentence.

It appears that there is a strong theme from the Sentencing Council within the 'Consultation Paper' to support changes to a Life Sentence and either provide a non-parole period or allow a Lifer to seek a re-determination of the Life sentence.

Reference is made to a report titled: '*Life Imprisonment – a policy briefing – Penal Reform International – April 2018*', it states the following;

*Principle of proportionality'*

*Any restriction to an individual's liberty must be in line with the principle of proportionality. In order to be just, a sentence must be of a length and type which fits the crime and the circumstances of the offender. This means firstly that, if a jurisdiction does have life sentences, they should be reserved only for the 'most serious crimes'. In turn, the law must be sufficiently flexible to allow judges to choose not to impose a life sentence where it would be disproportionate.*

*Recommendation 2:*

*If life sentences other than life without parole are imposed, they should be used only when strictly needed to protect society and only in cases where the 'most serious crimes' have been committed.*

As a civilised and educated society, do we really want to even consider releasing back to the community, offenders such as;

*'Sef Gonzales, Alan O'Connor, Roger Dean, Andrew Garforth, Malcom Baker, Robert Xie, Matthew Harris, Crespín Adanguidi, Daniel Leslie Miles, Vestor Fernando' ?*



Reference is made to a report titled: *'Life Imprisonment – a policy briefing, prepared by Penal Reform International) April 2018'*, it refers to the following on page 7;

*Impact of life imprisonment:*

*The pains of imprisonment have been well-documented, but unique to life imprisonment is the pain of indeterminacy. While there are differing responses among prisoners, individuals serving life sentences commonly report that life imprisonment is a particularly painful experience due to the uncertainty of release. Serving an indeterminate sentence has been described by different individuals as 'a tunnel without light at the end', 'a black hole of pain and anxiety', 'a bad dream, a nightmare', and even 'a slow, torturous death'.<sup>23</sup> Many life-sentenced prisoners report a sense of shock and powerlessness during the initial stages of imprisonment.*

*Lack of control, futility of existence and fear of institutionalisation are recurring themes among prisoners serving indeterminate prison terms. Social isolation and the loss of contact with the outside world is one of the most significant effects of lengthy imprisonment. Many life-sentenced prisoners grieve over the loss of family members during the long years of confinement, as well as being no longer able to have or raise children, or provide support for family members.*

There are very specific reasons that a 'Life Sentence' is imposed on an offender for the offence of murder. To suggest that they are punished whilst serving a sentence of Life, because the offender has no hope of being re-integrated back into society has been fortified once the offender has committed such a heinous crime on another person/s.

It is extremely important as a civilised and educated society, that we do not lose focus of why a determined prison term was imposed by a Judge, particularly a Life Term.

The following are excerpts from the Judges sentencing comments during sentencing for individual offenders sentenced to a Life Term in NSW;

Sef Gonzales – Life Sentence – Three Murders

***'Justice Bruce James said his crimes were so heinous that life imprisonment was the appropriate sentence. The murders of his sister Clodine, mother Mary Loiva and father Teddy were "in the worst category" of murder, with no mitigating factors, Justice James found. The premeditated deed was so extreme that only three life sentences would meet society's interest in retribution, punishment, community protection and deterrence'.***

Alan O'Connor – Life Sentence – Three Murders

***Justice Robert Hulme said the sentence needed to be strong to deter domestic violence crimes. He said anyone who could kill their partner over an interest in another person was the "antithesis of what a mature, humane and law-abiding society will tolerate". (information source: NSW media reports)***

Roger Dean – Life Sentence – Eleven Murders

***Judge Latham said Dean had a reckless indifference to human life and conducted himself in a self-serving manner. She said his victims, aged from 73 to 97, were in a high dependency ward and vulnerable. The judge said Dean's moral culpability was not in any way diminished by his self-obsessed personality disorder. (information source: NSW media reports)***

Andrew Garforth – Life Sentence – One Murder

***The case was described by Supreme Court Judge, Justice Newman, as being in the "worst category," joining only four other cases in NSW's entire history. This is because Garforth could produce no defence or explanation for his actions. Justice Newman described him as "heartless" and sentenced him to life imprisonment. His case was marked "never to be released" as he posed too much risk to the community.***

***Justice Newman stated that the crimes committed by Andrew Garforth "Fall squarely into the category of the worst type of case, (his) comments about what he expected the girl to do after he threw her, tied up, in the dam, was chilling in the extreme the indifference to the fate of his victim by the prisoner would appal any civilised human being his intention was not to cause grievous bodily harm his intention was to kill" With that told Andrew Garforth he serves life imprisonment and his file was marked 'never to be released'. (information source: NSW media reports)***

Robert Xie – Life Sentence – Five Murders

***Justice Elizabeth Fullerton told the packed courtroom of the horrifying scene “awash with blood” that greeted police when they entered the two storey home.***

***The amount of blood in the bedrooms was not only an “immediate and graphic” illustration of the “murderous assault” which killed them, it also revealed they were killed in the rooms — and in the case of the adults — in their “blood soaked” beds.***

***Of all five victims, young Terry Lin was the only one not killed instantly, such was the severity of the injuries each family member received to their heads and faces.***

***A distinct pattern was visible on their battered faces, with a forensic pathologist later determining a hammer-like object was used as the murder weapon.***

***Justice Fullerton said the murders were “heinous in the extreme” and were “a single episode of brutal and calculated murderous violence”.***

***She was satisfied Xie killed the family with a hammer like object with a rope attached “most likely so he didn’t lose control” of it and also to maximise “the degree of force to ensure he killed with speed and efficiency”.***

***Justice Fullerton also said she believed Xie used a key that was cut for his wife Kathy — Min Lin’s sister — and used his knowledge of the home he gained as a “trusted family member” to carry out the murders.***

***She told the court the brutal nature of the murders and “the meticulous planning” that went into them convinced her Xie was a danger to the community and should never be released. “The offender inflicted extreme violence with the intention that all occupants of the house should die”. (information source: NSW media reports)***

Matthew Harris – Life Sentence – Three Murders

***Sentencing: On 3 December 1999 Harris pleaded guilty to the murders and the robbery of Trang Nguyen. On 7 April 2000 NSW Supreme Court Justice Virginia Bell sentenced Harris to 3 concurrent terms of 40 years imprisonment with non-parole periods of 25 years in relation to the murders and 3 years imprisonment in relation to the robbery, making him eligible for parole on 30 November 2023.***

***On 2 May 2000 the matter was mentioned in New South Wales Parliament where it was noted that “Harris in a police record of interview said “... to murder and to keep murdering and to get away with it was an achievement ...I'd still be going if I hadn't***

***been caught." and that the sentences were "far too lenient".***

***The Director of Public Prosecutions appealed against the murder sentences on the basis that they were inadequate. On 20 December 2000 the NSW Court of Criminal Appeal upheld the appeal and quashed Harris' sentences in relation to the murders of Ford and Galvin, substituting them with life sentences. Chief Justice Wood noted that "I am of the view that the criminality of the respondent, and the level of his dangerousness, are such that, notwithstanding the principles there discussed, it is necessary for the Court to intervene". (information source: NSW media reports)***

***On appeal, the sentence for the first count was confirmed, but on the second and third counts life sentences were imposed. Addressing the issue of totality, Wood CJ at CL, stated: "There was an error of law... in the failure to give due recognition to the degree of heinousness involved in the taking of three human lives in the circumstances such as were present in this case. Where [the sanctity of life] is ignored in a callous, brutal, repeated and savage way, and where there are multiple victims who are elderly, sick, or disadvantaged, then, in the absence of exceptional circumstances reducing the offenders' culpability, the maximum penalty must be expected." (source of information: NSW media reports)***

#### Crespin Adanguidi - Life Sentence – Three Murders

***West African man Adanguidi, 27, murdered the wife and children of his Chinese gay lover Raymond Shen at Rockdale, on February 1, 2003. He pleaded not guilty on the grounds of mental illness. But a jury convicted him of bludgeoning Shiquin Zhu, 55, and shooting Pin Shen, 27, and Christy Bo Shen, 23. The previous night he attacked Shen, tied him up and held him hostage at his Maroubra unit, demanding \$200,000. In 2005 aged 27 he was sentenced to three life sentences without the possibility of parole. An appeal in 2006 was dismissed. (information source: NSW media reports)***

#### Daniel Leslie Miles - Life Sentence – Three Murders

***A man who committed a second murder while on the run from a Sydney jail had his sentence increased to life yesterday after the appeal court found he had a "dangerous propensity" to kill again.***

***Daniel Leslie Miles, 29, murdered Yolanda Michael, 29, who had be friended him while he was in jail. He killed her after escaping from the John Morony Correctional Centre, at Windsor, where he was already serving 18 years for killing his childhood sweetheart, Donna Newland, in 1990.***

***At the subsequent hearing into Ms Michael's murder, Justice Peter Hidden rejected the Crown's submission for a life sentence, finding Miles had a reasonable prospect***

***of rehabilitation despite the "chilling" similarities between the murders. He was jailed for a minimum 21 years.***

***But yesterday, following an appeal against the leniency from the Director of Public Prosecutions, two Court of Criminal Appeal judges quashed Justice Hidden's sentence and jailed Miles for life.***

***"In my view this case is one in which the sentence imposed at first instance displayed a leniency of such a magnitude that error should be assumed," Justice Ian Carruthers said.***

***He said it had been proven beyond any doubt that Miles should not be a candidate for parole. The court found the features of Miles's murders were of "very great heinousness" and fell into the very worst category of killings.***

***A more severe penalty was warranted to demonstrate retribution, deterrence and protection of society, the judges ruled. (information source: NSW media reports)***

#### Vestor Fernando - Life Sentence – Two Murders

***Included in the long-form list is the horrific story of Sandra Hoare, a nurse who was abducted, raped, and murdered in the north-west NSW town of Walgett in December 1994. Hoare's assailants, cousins Vester and Brendan Fernando, happened to be Aboriginal. Their assault on Hoare was extremely violent, leaving her nearly decapitated, and sent shock waves through the community. (information source: NSW media reports)***

I have specifically identified these nine cases of offenders committing a single murder or multiple murders to highlight the seriousness of the crimes that these individual offenders have inflicted on the victims and society.

More recently we witnessed the release to parole of Berwyn Rees. He was convicted of three murders including that of a NSW Police Officer and sentenced to Life in April 1981. Under the current laws in NSW, he would have been automatically considered for sentencing to natural Life because of the murder of a Police Officer.

I would think that society today would not expect or even anticipate that an offender such as Rees be granted the opportunity to be released back into the community. We certainly do not want to be faced by this type of situation ever again in the future.

Berwyn Rees – Three Life Terms – Three murders.

***Rees, 69, has been called 'one of the most cold-blooded killers ever to enter a NSW prison' and his shooting spree shocked the nation four decades ago.***

***The judge who sentenced Rees to three life terms for the 'mindless slaughter of three young men' described his crimes as 'wanton and merciless killings'.***  
(information source: NSW media reports)

Reference is made to a document titled: ***'SENTENCING FOR "LIFE" IN NEW SOUTH WALES , Research in Progress - The Judicial System - Author: John Anderson'***

***During my work in the Supreme Court, I was instructing solicitor to the Senior Crown Prosecutor, then Mr Ian Lloyd QC, in the high profile case of R v Malcolm George Baker. Baker ultimately pleaded guilty to six counts of murder and I was present at the bar table on 6th August 1993 when Justice Peter Newman uttered the words:***

***In relation to each of the crimes of murder. . I sentence the prisoner to penal servitude for life.'I will never forget the scene in the packed courtroom at Newcastle as all the members of the public gallery rose as one shouting their unanimous approval of the sentence. Although it wasn't the first natural life sentence to be imposed under the new sentencing regime, this unique personal experience had an enormous impact on me. Undoubtedly this was an horrific case; six people, including a heavily pregnant woman, shot dead by Baker in a vengeful and 'bloody odyssey which took place during approximately one hour on an October evening in 1992. At the same time, however, it seemed the prisoner himself and his future lifetime incarceration was forgotten in the slipstream of celebration by members of the families and friends of the various victims that followed the sentencing. There was even a festive gathering in the hotel opposite the Court House, which I did attend, albeit some what reluctantly and briefly. This case was the genesis of my later PhD research examining the life sentence for murder and the impetus grew as more life sentences were imposed by Supreme Court Judges in various murder cases throughout the 1990s.***

***Shortly after the sentencing of Malcolm Baker, another accused 'Malcolm' pleaded guilty to a charge of murder. The case of R v Malcolm James Hungerford, in which I was also a part of the prosecution team, provided an interesting basis for contrast and comparison to Baker's case. Sentence was passed on Hungerford by the same judge eleven days after the natural life sentence had been imposed on Baker. The only factor that saved this prisoner from a life sentence, according to Newman J,***

**was his youth. Hungerford was 20 years old when he brutally raped and murdered a 49 year-old woman early one morning when she was on her way to work at a hotel in Singleton. The sentence of imprisonment for 24 years with a minimum term of 18 years was considered, at that time, to be a very lengthy and salutary sentence.**

Reference is made to a document titled: 'SENTENCING FOR "LIFE" IN NEW SOUTH WALES , Research in Progress - The Judicial System - Author: John Anderson'

*These findings disclose a very blurred dividing line between those cases which merit a "natural life" sentence and those which result in the certainty of a determinate sentence. The significant gulf that can exist in reality between such sentences, illustrates the need for reform in the interests of justice and fairness. Arguably these findings provide some justification for the recommendation by the NSW Law Reform Commission in their report on Sentencing ( Report 79, December 1996) that the judicial discretion under s.19A should include an option to fix a minimum term when a life sentence is imposed. Perhaps the available minimum term should be set at a maximum of 25 or 30 years consistent with the sentencing range established by the judiciary for determinate sentences under s.19A. Alternatively another "indeterminate" sentence option might be considered, namely that a life sentence be imposed at first instance with a condition that the prisoner serve a certain period of time before applying for determination of the life sentence in a procedure similar to that currently available under s.13A Sentencing Act, 1989. It is part of my thesis that such reforms might go some way to mitigating the inherent harshness and real injustice of the life sentence in NSW in its present form.*

*The natural life sentence might be described as an "enigma" in the sentencing armoury of the NSW Supreme Court judges. It is a sentence subject to immense uncertainty and has been criticised by academics and by members of the judiciary. It is interesting that in R v Petroff (unreported, SC NSW, 12 November 1991), Hunt CJ at CL, who over the following five years imposed natural life sentences on three different prisoners, observed:- .a (life) sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been increased difficulty in their management by prison authorities." (at 1-2)*

*Apart from providing an extreme form of retribution, it is doubtful that a sentence of penal servitude for the term of a person's natural life can serve any other useful purpose. If, however, it is to remain as the ultimate punishment, which certainly is preferable to the re-introduction of capital punishment, there must be specific limits placed on its use either by the formulation of clear statutory criteria or by pronouncement at the highest appellate level of the particular cases in which such an extreme form of punishment should be imposed.*

What is very disturbing when reading these types of studies, is the focus being on the offender that has been sentenced to a natural term of Life and the highlighted onerous conditions that the offender will endure whilst serving this category of sentence, by way of destructing his morale and not being able to be released back into the community after serving a specific period in custody.

It is a dangerous path to focus on the rehabilitation prospects of an offender that has committed such horrendous crimes and imposed devastation on the families, friends of the victim and general community and loose track on what had occurred at the time of the commission of these crime/s. The priority for corrections in these particular cases is the safe and humane custody of the offender.

There will certainly be cases and situations, that an offender is sentenced to a specified non-parole period for the offence of murder and still be able to have an opportunity to be released back into the community in order to live as a law abiding citizen. There are many individual cases of this situation occurring and with success.

I reiterate that it will be the judicial process and the sentencing of these individuals that will determine if they are given that opportunity of one day being released from prison.

If we are circumventing this judicial process in order to not burden the offender whilst serving a natural Life sentence and put aside the irreversible damage and impact that the offenders crime has had on innocent people, then we will continue to be faced with outrage by the community, which should be protected at all costs. The saying that a 'person is sent to prison as their punishment and not to sent to prison for punishment' is what should be applied when an offender is incarcerated and in particular for natural 'Life Term' inmates.

Reference is made to a report prepared by the 'Judicial Commission of NSW, titled: *Sentenced Homicides in NSW 1994 -2001 – January 2004 - Chapter 10*;

*Extreme violence and brutality. To warrant a life sentence, an offender must commit a crime of such heinousness that deterrence, retribution and denunciation demand the imposition of the maximum available penalty. In order to fall within this category it must be:<sup>327</sup> "possible in the individual case to point to its particular features which are of very great heinousness, and there must be an absence of any facts mitigating the objective seriousness of the crime (as distinct from any subjective features mitigating the penalty to be imposed." That is to say an objective assessment of the crime must be made to establish a threshold of "heinousness"— a term "variously described as meaning atrocious, detestable, hateful, odious, greatly reprehensible and extremely wicked". This*



*threshold test has been described as a substantial one to satisfy.*

*Similarly, a life sentence is not considered inappropriate in a particular instance merely because it is possible to envisage a worse case, for “ingenuity can always conjure up a case of greater heinousness”. So, while some cases may be more heinous than others, it is fair to say that most, if not all, of the 17 offenders sentenced to life imprisonment in the present study period committed crimes that can fairly be characterised as extremely violent, brutal and callous. These include cases such as: R v Milat, the serial killer convicted for the sadistic murders of 7 young victims, whom he apparently hunted and tortured for his own amusement R v Knight, the only female sentenced to life imprisonment, who skinned, decapitated and butchered her male partner and cooked parts of his body R v Leonard, whose hatred of homosexuals led him to shoot a man with a bow and arrow before dismembering and dumping the body, and who later killed a taxi driver in a frenzied and unprovoked attack R v Valera, who in separate incidents brutally bashed and butchered two older men in their own homes and carried out extensive mutilation and dismemberment of their bodies R v Suckling and R v Fernando and Fernando which involved the abduction, sexual assault and killing of female victims in the most brutal and callous fashion. These cases are mentioned not in order to shock, but to highlight that those cases that do attract life sentences are truly heinous in their nature, and deserving of full and severe punishment.*

*Dangerousness and protection of the community:*

*A factor that weighs heavily in favour of the imposition of a life sentence is dangerousness and the need to protect the community from further acts of violence by the offender. This factor was recognised by the High Court in Veen v The Queen (No 2), and is now listed in the Crimes (Sentencing Procedure) Act 1999, s 61(1), as one to which the court must have regard, and a life sentence is to be imposed if the court is satisfied that the offender represents an ongoing danger. The notion of dangerousness is closely linked to the nature of the offences committed. The very nature of the offences under consideration inevitably leads to the conclusion that a person capable of committing acts of:337 “the most senseless, ruthless, irresponsible and gross violence...with a completely callous lack of concern or remorse for what he has done... will inevitably be a danger to the community if he is ever freed.”*

*The need to protect the community was certainly to the fore in: the case of mass murderers such as Milat and Rose. Cases where the offences were unprovoked, senseless or even random in their nature, such as Suckling, Leonard, Steele, Kanaan and Hill cases such as Street and Knight where the offender had shown an ongoing propensity for violence towards partners in intimate relationships.*

I will now refer to three cases that I am very familiar with and had involvement with these individuals management whilst in custody.

These individuals were convicted for the offence of murder and conspiracy to murder.

### **Andrew Kalajzich**

*Kalajzich was jailed in 1988 after being convicted of hiring a hitman to shoot his wife Megan twice in the head as she lay in bed in their northern beaches home on January 27, 1986.*

*He was found guilty of three charges including murder, conspiring to murder and attempting to discharge a loaded firearm with intent to murder.*

*Kalajzich will be closely supervised while on parole and monitored by Corrective Services NSW. A review by the Serious Offenders Review Council found that he made excellent progress and was "a model inmate".*

*He will be subject to strict conditions for the next three years including psychological counselling if directed, a ban on possessing firearms and no overseas travel without prior permission. He will also have to report to a parole supervisor as directed.*

### **Vincent Piller**

*Michael Marslew, 18, was working at Jannali Pizza Hut in 1994 when Vincent Piller and Kramer's brother Andrew burst into the shop armed with a shotgun. Karl Kramer and another getaway driver Douglas Edwards waited in the car.*

*During the bungled robbery, Piller shot Michael in the back of the neck. He was convicted in the NSW Supreme Court on the 6 July 1995 – sentenced to 13 years minimum term.*

### **Phillip Lim & (Chew Liew)**

*Lim served an 18 year minimum term for the murder of Dr Victor Chang and was deported back to Malaysia on 3 March 2010.*

*Opposition legal affairs spokesman Greg Smith said the state government had caused "cruel torment" for the Chang family by allowing Lim to be released.*

*The shadow attorney-general, Greg Smith SC, says Lim should not be allowed to return to Malaysia.*

*"It doesn't seem right that he goes back to his own country where apparently there is no parole reciprocity," he said.*

*"If he commits further offences there or does other things, which in Australia would be a breach of parole, he can't be called back into prison."*

### **Chew Seng Liew & (Phillip Lim)**

*Chew Seng Liew, was sentenced to a 20 year minimum term and maximum of 26 years in prison for the 1991 shooting of the Victor Chang (heart surgeon) during a failed extortion attempt.*

*It was Liew who fired the two shots which killed the prolific doctor.*

*The court heard Liew will be deported upon his release from Long Bay between October 3 and October 10. He will be released "directly into the custody of (Immigration) officials," the authority said.*

In summary, it is my professional opinion, that the current sentencing system does work.

What can be determined from the three above cases involving murder, where there was a significant public interest involved and community outrage, that the courts when imposing a specific non-parole period for the offender, has allowed in these three cases the opportunity (rehabilitation) for the offenders to not only progress through the correctional system in relation to program participation, employment and classification and to be eventually released back into the community.

In the matters of Kalajzich and Pillar, both of these offenders have returned to the community to live as law abiding citizens. In the case of Lim and Seng, both of these offenders have served their non-parole period / minimum term and partly into their additional term, and then were deported back to their country of origin.

Reference is made to a document titled;

[www.publicdefenders.nsw.gov.au/Documents/murder-accessorial-liability.pdf](http://www.publicdefenders.nsw.gov.au/Documents/murder-accessorial-liability.pdf)

This document which has been prepared by the 'Public Defenders' and details the sentences imposed on offenders for the offence of murder and other category of crimes. This clearly indicates the consideration of providing specific minimum terms / non-parole periods for offenders within this category of offence and provides the offender the opportunity for rehabilitation prospects and eventual release back into the community under parole supervision. It also indicates the seriousness in a number of cases, whereby the Judge has imposed a 'Life' sentence.

The courts have an option of imposing a Life sentence for the extreme and worst cases and as identified through out this submission, is reflective of the need to demonstrate retribution, deterrence and protection of society.

There is also the option of imposing a specified non-parole period / minimum term for the offence of murder, as identified in the three cases involving 'Kalajzich, Pillar, Lim and Seng'.

Right or wrong and whether we agree or disagree with the custodial sentences that were imposed in these three cases and others detailed within the 'Public Defenders list, they were applied by the courts via a judicial process.

It is my recommendation that we do not amend any of the sentencing options for murder that would involve a 'Life sentence with a non-parole period' or any 'redetermination of an existing Life sentence'. We currently have a system that is not only fair and just, but is operating effectively and most importantly it allows justice to be served and protects the community.

Forwarded for your consideration,



Domenic Pezzano JP

3 February 2020